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No. 98-426

In The

Supreme Court of the United States

October Term, 1998

CITY OF OXNARD, *et al.*,

Petitioners,

vs.

JENNIFER JENSEN, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

EDWARD STEINBRECHER
Counsel of Record
STEINBRECHER & ASSOCIATES, P.C.
Attorneys for Respondents
16830 Ventura Blvd.
Suite B
Encino, California 91436
(818) 986-3332

149255

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

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Supreme Court Rule 10 1

Respondents respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Ninth Circuit Court of Appeals decision in this case because there are no special or important reasons for granting certiorari according to the considerations governing review on certiorari as set forth in Rule 10 of the rules of this Court.

STATEMENT OF JURISDICTION

Respondents concur that jurisdiction of this Court is asserted under 28 U.S.C. § 1254(1).

COUNTERSTATEMENT OF THE CASE

This case involves the intentional and reckless use of deadly force by one police officer against another police officer who was mistakenly identified as a suspect during a "shoot to kill" SWAT raid. According to the complaint, the City of Oxnard staged a reckless SWAT unit raid to serve a search warrant on an unoccupied residence. Officer Jensen led the raid and was required to detonate a "flash-bang" grenade. The grenade obscured visibility in the room. " '[i]n the turmoil of events, [Sergeant] Christian mistook [Officer Jensen] for a gun-wielding occupant of the premises and shot him to death.' " [Slip Opn., App. A to Pet. p. 7a].

Officer Jensen's wife and children brought suit in federal district court against petitioners the City of Oxnard and individual defendants including Sergeant Christian, alleging a violation of Officer Jensen's rights under the Fourth Amendment to be free from unreasonable seizure. The premise of the complaint is that Sergeant Christian's use of deadly force was excessive and unreasonable under the circumstances. Petitioners moved to dismiss the complaint on the grounds that they are all entitled to qualified immunity and that the complaint

failed to state a claim under Fed. R. Civ. P. 12(b)(6). On interlocutory appeal, the court of appeals affirmed the district court's decision that the complaint stated a valid legal claim under the Fourth Amendment and that Officer Jensen's status as a police officer did not deprive him of his rights under the Fourth Amendment. The court of appeals further ruled that neither the individual defendants nor the City are entitled to qualified immunity because Officer Jensen's Fourth Amendment right to be free from unreasonable seizure was well-established at the time of the shooting. The case was remanded for discovery and further pre-trial proceedings.

REASONS FOR DENYING THE WRIT

In essence, the City of Oxnard[1] seeks review claiming that a police officer is not a "free citizen," has no Fourth Amendment rights, and is restricted to worker's compensation benefits even when illegally seized and killed as a suspect.

The City's arguments are inapposite and do not justify granting certiorari in this case.

Officer Jensen was not shot in the back three times because he was a police officer; **he was shot because Sergeant Christian considered Jensen the suspect**.

Review is unwarranted for two reasons.

First, there is no conflict among the federal circuit courts or state courts of last resort regarding the questions presented here. Second, the court of appeals' conclusion that defendants are not entitled to qualified immunity from plaintiffs' claim of unreasonable seizure under the Fourth Amendment is well

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1. Petitioners will be collectively referred to as "the City."

established in the case law including the precedents of this Court.

The City's effort to mischaracterize this as a "safe workplace" case simply ignores the plain facts which show an unlawful seizure of Officer Jensen. "A seizure occurs even when an unintended person or thing is the object of the detention or taking." *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989).

Contrary to the City's petition, police officers do not forfeit their Fourth Amendment rights by joining the police force. *Jackson v. Gates*, 975 F.2d 648 (9th Cir. 1992); *Graham v. Davis*, 880 F.2d 1414, 1418-1419 (D.C. Cir. 1989).

The Ninth Circuit did not ignore the proper role of state government in a federal system. Workers' compensation laws do not necessarily preempt remedies for civil rights violations. *Maynard v. City of San Jose*, 37 F.3d 1396 (9th Cir. 1994).

This is not an "abnormally dangerous employment" case. Nothing in *Collins v. Harker Heights*, 503 U.S. 115 (1992) suggests that an illegally shot suspect who happens to be a police officer does not have constitutional remedies. As the Ninth Circuit recognized in this case,

> While the safe workplace cases concern the failure of the state to adequately train, prepare, or protect government employees from non-state actors, this case involves the allegedly intentional or reckless acts of a government employee directed against another government employee.

[Slip Opn., App. A to Pet. pp. 11a-12a].

The Ninth Circuit Opinion does not convert federal courts into workers' compensation appeals boards. Indeed, the City exaggerates the potential costs to public entities. And, of course, the cost argument is simply inapposite to the necessary redress of civil rights violations.

The Ninth Circuit opinion has not constitutionalized the common law of torts but merely applies existing precedent to the facts of this case. *See, i.e., Graham v. Connor*, 490 U.S. 386 (1989), and *Tennessee v. Garner*, 471 U.S. 1 (1985).

The City's petition does not raise issues of importance except to the litigants in this case. As Chief Justice Taft observed,

> . . . . [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is important to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeals.

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923).

There are no such reasons for granting certiorari in this case.

I.

THERE IS NO CONFLICT IN THE FEDERAL CIRCUIT COURTS OR STATE HIGH COURTS.

There is no split in authority over the court of appeals' determination that the complaint states a valid legal claim and

that petitioners are not entitled to qualified immunity for the allegation in the complaint of an intentional and reckless violation of decedent's Fourth Amendment right to be free from unreasonable seizure. Petitioners have identified no such split in authority. The only other court of appeals decisions discovered by either party are consistent with the Ninth Circuit's holdings in this and prior cases. Thus, the D.C. Circuit has permitted a claim against city officials arising under the Fourth Amendment for an unreasonable seizure arising out of an altercation and shooting between two police officers at the scene of a crime. *See Graham v. Davis*, 880 F.2d 1414, 1417 (D.C. Cir. 1989). The Ninth Circuit has previously held that police officers may recover under section 1983 for unreasonable searches. *See Jackson v. Gates*, 975 F.2d 648, 652 (9th Cir. 1992). Neither party has identified any decisions of a state high court to the contrary of the court of appeals' holding here. Accordingly, there is no conflict warranting this Court's review.

II.

THE COURT OF APPEALS' CONCLUSION THAT THE COMPLAINT STATES A VALID CLAIM AND THAT PETITIONERS ARE NOT ENTITLED TO QUALIFIED IMMUNITY IS WELL-ESTABLISHED IN THE CASE LAW.

A. Police Officers Have Rights Not To Be Shot in the Back Under the Fourth Amendment's Prohibition Against Unreasonable Seizure.

The court of appeals followed well established case law by analyzing Officer Jensen's claim as an unreasonable seizure under the Fourth Amendment. Here, the complaint alleges that Sergeant Christian intentionally applied excessive deadly force to seize or stop Officer Jensen. A Fourth Amendment seizure

occurs whenever government actors have "in some way restrained the liberty of a citizen." *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989). "A seizure occurs even when an unintended person is the object of the detention or the taking." *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989).

Petitioners admit that Sergeant Christian intended to gain control over Officer Jensen because he thought Jensen was the suspect. Any "mistake" as to Jensen's identity does not vitiate Jensen's Fourth Amendment rights. *See Hill v. California*, 401 U.S. 797, 802-05 (1971) (seizure occurs in case of mistaken identity because detention was intended even though the specific subject was not the intended object); *see also Grandstaff v. City of Borger*, 767 F.2d 161, 165-68 (5th Cir. 1985) (shooting of an innocent victim on the mistaken belief that victim was a fleeing suspect gives rise to liability because seizure intended even though target was not). Sergeant Christian intentionally terminated Officer Jensen's freedom of movement by shooting him. Because "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment," the complaint alleges a violation of section 1983. *See Tennessee v. Garner*, 471 U.S. 1, 7 (1985).

Moreover, it is well established that a citizen does not forfeit his constitutional rights when he becomes a member of the police force. *See Jackson v. Gates*, 975 F.2d at 653 (drug testing of police officers subject to reasonableness test for seizure under the Fourth Amendment); *Graham v. Davis*, 880 F.2d at 1417 (permitting claim by police officer for unreasonable seizure under the Fourth Amendment as a result of altercation with another officer at crime scene); *see also Meyer v. Robinson*, 992 F.2d 734 (9th Cir. 1993); *Rutherford v. City of Newport News*, 919 F. Supp. 885, 896 (E.D. Va. 1996) ("Of course, government employees do not lose their

constitutional rights once they agree to work for the state.") Public employees retain their rights under the Fourth Amendment to be free from unreasonable searches and seizures. *See National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989). Thus, petitioners' arguments that police officers are equivalent to school children and that their status deprives them of the full protection of the Fourth Amendment is simply wrong. [*See* Pet. pp. 6-7].

Since respondent's claim arises under the Fourth Amendment, petitioners' argument that this case must be analyzed under the Due Process Clause of the Fourteenth Amendment is misplaced, as the very cases on which they rely establish.

> Where a particular amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing those claims.

County of Sacramento v. Lewis, 118 S. Ct. 1708, 1714 (1998) (citing *Graham v. Connor*, 490 U.S. at 394); *see also Tennessee v. Garner*, 473 U.S. at 7-22.

Respondent need not demonstrate that she can satisfy the standards for recovery under the Fourteenth Amendment because the claim arises properly under the Fourth Amendment. Compare *County of Sacramento v. Lewis*, 118 S. Ct. at 1712 (decedent did not allege violation of Fourth Amendment but only substantive due process from high speed car chase); *Collins v. Harker Heights*, 503 U.S. 115, 127 (1992) (decedent alleged only violation of substantive due process by failing to provide a safe workplace).

Similarly, the allegations of this complaint are not analogous to those of the pretrial detainees in *Riley v. Dorton*, 115 F.3d 1159 (4th Cir. 1997) (en banc), who, by reason of their status as pretrial detainees may not rely on the Eighth Amendment but are limited to claims under the Due Process Clause of the Fourteenth Amendment. *Id.* at 1166.[2]

Because this case falls well within established Fourth Amendment doctrine, there is no need for respondent to rely on another theory of recovery. Thus, even if respondent could not satisfy the Fourteenth Amendment standards, that does not preclude her Fourth Amendment claim. *See Graham v. Connor*, 490 U.S. at 395.

Petitioners also claim that police officers are not entitled to the protections of the Fourth Amendment, but are limited to workers' compensation benefits even when illegally seized and killed by an officer as a suspect. This claim is misplaced because Officer Jensen was not killed by gas fumes or other work related factors: **he was seized and killed because he was a suspect**.

As the court of appeals recognized in distinguishing *Collins* from this case,

> while the safe workplace cases concern the failure of the state to adequately train, prepare, or protect government employees from non-state actors, this case involves the allegedly intentional or reckless

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2. In *Riley*, the Fourth Circuit rejected pretrial detainees claim that they were entitled to assert violations under the Fourth Amendment where allegations concerned use of excessive force beyond the time of arrest. 115 F.3d at 1161-64; *see also Bell v. Wolfish*, 441 U.S. 520, 535-39 (1979) (Due Process Clause protects pretrial detainees from use of excessive force that amounts to punishment).

> acts of a government employee directed against another government employee.

[Slip Opn., App. A to Pet. pp. 11a-12a]. For the same reasons, the other cases cited by petitioners involving workplace injuries are readily distinguishable because they did not "involve the use of excessive force by a government agent against a government agent." *Id.* (citing cases).[3]

The court of appeals was also correct in affirming the district court's denial of qualified immunity. It was well established at the time of Officer Jensen's death that an officer may not shoot to kill a suspect unless certain circumstances are present, such as the officer was threatened or the officer could reasonably anticipate that the suspect would cause harm to others. *See Harris v. Roderick*, 126 F.3d 1189 (9th Cir. 1997) (citing cases).

Moreover, the court of appeals was also correct in concluding that police officers are required to give a warning if possible before shooting to kill. *Tennessee v. Garner*, 471 U.S. at 11-12. Thus, Sergeant Christian could have no reasonable belief that he had a license to shoot and kill innocent persons if they were mistaken for suspects. *Cf. id.* at 11. He could have no reasonable belief that shooting blindly into a

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3. None of the remaining safe workplace cases cited by petitioners, all of which predate *Collins*, involved a deliberate deprivation of constitutional rights by unreasonable use of excessive force alleged here or even alleged injury by a state actor. *See Washington v. District of Columbia*, 802 F.2d 1478, 1481 (D.C. Cir. 1986) (prison guard attacked by prisoner failed to state constitutional injury); *McClary v. O'Hare*, 786 F.2d 83, 87 (2d Cir. 1986) (wrongful death of county highway department employee from fatal accident); *Hayes v. Vessey*, 777 F.2d 1149 (6th Cir. 1986) (prison teacher injured by a third party and not by a state employee or official).

smoke filled room or shooting an innocent, mistaken suspect in the back three times was constitutional.

The court of appeals properly recognized that respondent is entitled to maintain this action and that defendants are not entitled to qualified immunity.

B. Respondent's Claim Under the Fourth Amendment Not Precluded By California's Workers Compensation Statute.

The court of appeals did not ignore the role of state administrative law as petitioners assert. [Pet. p. 13].

There is no authority for the proposition advanced by petitioners that a claim under the Fourth Amendment for an unreasonable seizure is precluded by potential recovery under the workers compensation laws. In fact, relevant authority is directly contrary to petitioners' preclusion argument. *See Maynard v. City of San Jose*, 37 F.3d 1396, 1405 (9th Cir. 1994). When the Fourth Amendment is violated, a plaintiff may invoke section 1983 regardless of the availability of a state remedy. *See Daniels v. Williams*, 474 U.S. 338 (1986) (Stevens, J., concurring) (citing *Monroe v. Pape*, 365 U.S. 167 (1961)); *see also McNeese v. Board of Education*, 373 U.S. 668, 672 (1963) (section 1983 is supplemental). The availability of state law remedies does not eliminate liability under section 1983 for use of excessive force. *See Smith v. Fontana*, 818 F.2d 1411, 1414 (9th Cir. 1983); *Sanders v. Kennedy*, 794 F.2d 478, 480-82 (9th Cir. 1986).

The Ninth Circuit's determination that this action is not preempted by the California's worker's compensation act should not be reviewed by writ. This Court does not grant certiorari to review matters of state law decided by federal courts of appeal. *Haring v. Prosise*, 462 U.S. 306, 314 n.8,

(1983) ("Standing alone, a challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review.").

The California Labor Code does not provide an exclusive remedy where an injured employee's claim implicates fundamental policy considerations such as violations of constitutional rights. *See Maynard*, 37 F.3d at 1405; *see also Soares v. Oakland*, 9 Cal. App. 4th 1822 (1992) (exclusive remedy no bar to action based on battery); *Gantt v. Sentry Ins.*, 1 Cal. 4th 1083 (1992) (public policy exception for constitutional claims). Thus, California state law recognizes that its workers compensation laws must bend to accommodate federal constitutional rights to recovery.

Finally, the City's reliance on *Calatayud v. State*, 18 Cal. 4th 1057 (1998), is misplaced. In *Calatayud* one officer was wounded when a shotgun held by another officer accidentally discharged. The officer in *Calatayud* was never a suspect and was not shot because he was considered a suspect. The City's concern that the decision in this case would create a federal right of action for the officer in *Calatayud* is imaginary.

Moreover, the specter of a speculative flood of cases is vastly overblown by petitioners. [Pet. pp. 17-19]. The City's conjectural arguments afford no basis for granting certiorari.

CONCLUSION

The decision below did not involve an important question of federal law which needs to be settled by this court. Nor has the Ninth Circuit decided a federal question in a way to conflict with applicable decisions of this court or of another court of appeals on the same issues.

The Ninth Circuit correctly upheld the trial court's determination that qualified immunity is inapplicable to these facts. The City's petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWARD STEINBRECHER
Counsel of Record
STEINBRECHER & ASSOCIATES, P.C.
Attorneys for Respondents
16830 Ventura Blvd.
Suite B
Encino, California 91436
(818) 986-3332